LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-273

AFFILIATED FUND, INC., LORD, ABBETT & CO., ROBERT S. DRISCOLL and ALVIN H. BERNDT,

Petitioners,

v.

PAULETTE PAPILSKY,

Respondent.

AFFILIATED FUND, INC., LORD, ABBETT & CO., ROBERT S. DRISCOLL and ALVIN H. BERNDT,

Petitioners,

v.

HARRY LEVINE,

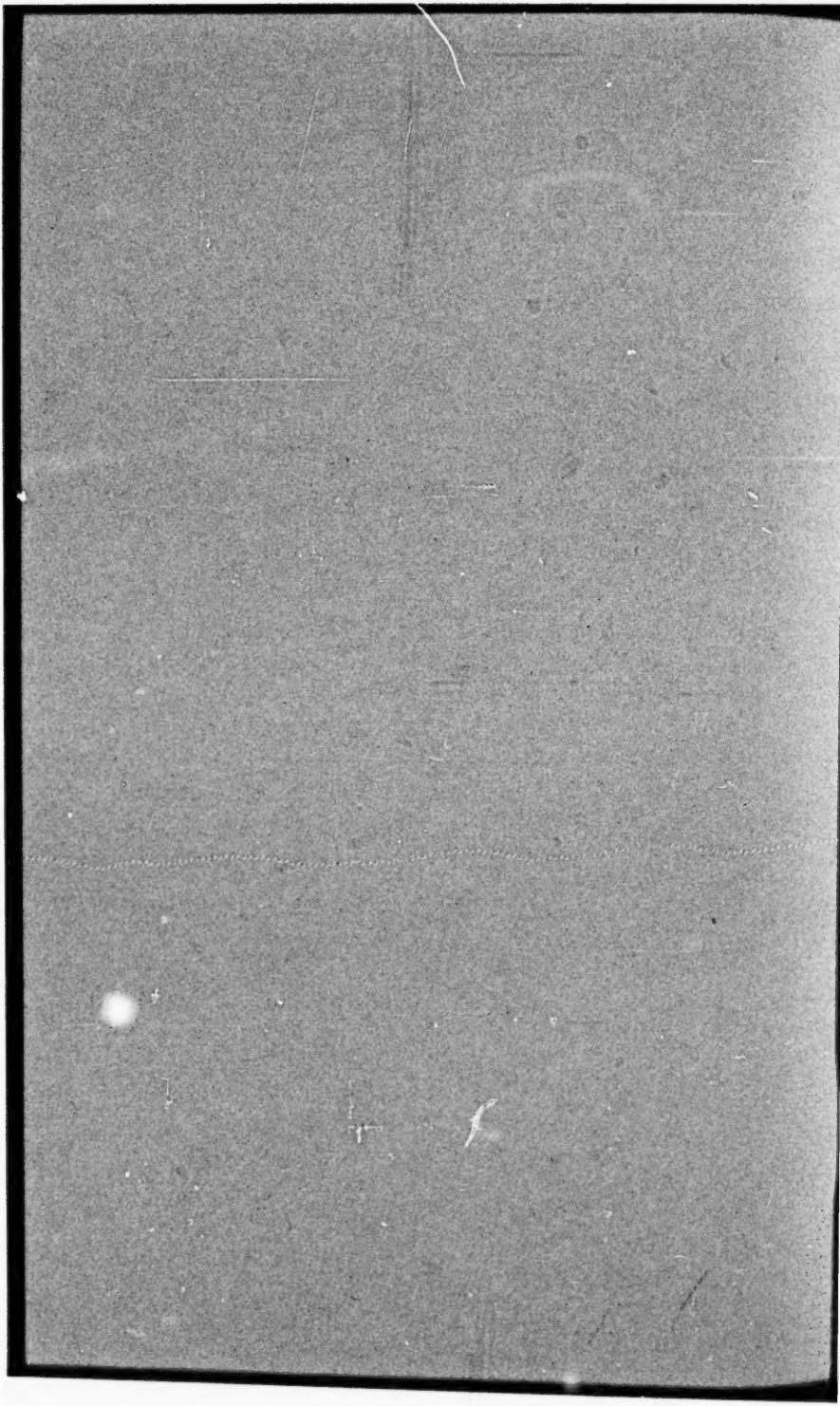
Respondent.

BRIEF FOR PLAINTIFF-RESPONDENT PAULETTE PAPILSKY IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM E. HAUDEK
Attorney for Plaintiff-Respondent Paulette Papilsky
295 Madison Avenue
New York, N. Y. 10017
Tel. No. (212) 532-4800

ABRAHAM L. POMERANTZ,
DANIEL W. KRASNER,
POMERANTZ LEVY HAUDEK & BLOCK,
Of Counsel

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4349



INDEX

PAGE

Question Presented 2

Statement of the Case 2

The pleadings 2

Defendants' motions in the District Court 5

The decisions below 7

REASONS FOR DENYING THE WRIT:

I—The Court of Appeals properly held that it lacked jurisdiction of defendants' appeal ... 8

II—The District Court properly denied defendants' motion; its decision involves no question warranting review by this Court 14

CONCLUSION 17

TABLE OF CASES

Ash v. *International Business Machines*, 353 F. 2d 491 (3rd Cir. 1965) 15

Borden Co. v. *Sylk*, 410 F. 2d 843 (3rd Cir. 1969) 9

Cathedral Estates v. *Taft Realty Corp.*, 228 F. 2d 85 (2d Cir. 1955) 12, 15, 16

Catlin v. *United States*, 324 U.S. 229 (1945) 8

Cobbledick v. *United States*, 409 U.S. 323 (1940) .. 8, 13

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 8, 9, 10, 12, 13, 14

deHaas v. *Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo. 1968), *aff'd* on this point, 435 F. 2d 1223 (10th Cir. 1970) 12

PAGE

Dopp v. *American Electronic Laboratories*, 55 F.R.D. 151 (S.D.N.Y. 1972) 15

Eisen v. *Carlisle & Jacquelin*, U.S. , 40 L. Ed. 2d 732 (1974) 12

Fleming v. *Berardi*, 441 F. 2d 732 (3rd Cir. 1971) 8

Fundamental Investors, Inc., Matter of, '61-'64 CCH Fed. Sec. L. Rep. ¶ 76,887 (SEC 1962) 4

Hawes v. *Oakland*, 104 U.S. 450 (1882) 13

Kauffman Mutual Fund Actions, In re, 479 F. 2d 257 (1st Cir.) *cert. denied*, 414 U.S. 857 (1973) 4, 15

Liboff v. *Wolfson*, 437 F. 2d 121 (5th Cir. 1971) ... 15

Meltzer v. *Atlantic Research Corp.*, 330 F. 2d 946 (4th Cir.), *cert. denied*, 379 U.S. 841 (1964) 15

Moses v. *Burgin*, 445 F. 2d 369 (1st Cir.), *cert. denied* sub nom. *Johnson* v. *Moses*, 404 U.S. 994 (1971) 3

Papilsky v. *Berndt*, 333 F. Supp. 1084 (S.D.N.Y. 1971), *aff'd*, 466 F. 2d 251 (2d Cir.), *cert. denied*, 409 U.S. 1077 (1972) 3, 5

Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 13

Ross v. *Bernhard*, 396 U.S. 531 (1970) 11, 13

Smith v. *Sperling*, 354 U.S. 91 (1957) 16

Swanson v. *Traer*, 249 F. 2d 854 (7th Cir. 1958) ... 15

United Copper Securities Co. v. *Amalgamated Copper Co.*, 244 U.S. 261 (1917) 15

AUTHORITIES

2A *Moore's Fed. Prac.* ¶ 12.14 (2d Ed. 1974) 8

Securities and Exchange Commission, Report on the Public Policy Implications of Investment Company Growth, 89th Cong., 2d Sess., H.R. 2337 (1966) 3

STATUTES AND REGULATIONS

	PAGE
Federal Rules of Civil Procedure	
Rule 9(b)	14
Rule 11	7, 16
Rule 23.1	3, 6, 13, 15, 16
Rule 41(b)	6
Rule 56	6
Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq.	
§ 2(a)(3)(C), 15 USC § 80a-2(a)(3)(C)	4
§ 2(a)(9) , 15 USC. § 80a-2(a)(9)	4
28 United States Code	
§ 1291	8
§ 1292	8
§ 1292(b)	2

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-273

AFFILIATED FUND, INC., LORD, ABBETT & CO., ROBERT S. DRISCOLL and ALVIN H. BERNDT,

Petitioners,

v.

PAULETTE PAPILSKY,

Respondent.

AFFILIATED FUND, INC., LORD, ABBETT & CO., ROBERT S. DRISCOLL and ALVIN H. BERNDT,

Petitioners,

v.

HARRY LEVINE,

Respondent.

BRIEF FOR PLAINTIFF-RESPONDENT PAULETTE PAPILSKY IN OPPOSITION TO PETITION FOR CERTIORARI

In this stockholder's derivative action, the District Court for Southern New York, Tyler, J., denied the motion of defendants (petitioners here) to dismiss the complaint or to strike certain of its allegations (A-31; 59 F.R.D. 95). It also denied defendants' application for an interlocutory

appeal certificate under 28 USC § 1292(b) (A-43). Defendants appealed, nevertheless (R 227a, 230a), but the Second Circuit unanimously dismissed the appeals for lack of appellate jurisdiction (A-41; opinion not yet reported). Defendants seek certiorari. Plaintiff-respondent Papilsky submits this brief in opposition.

Question Presented

> Could defendants appeal as of right from the interlocutory order of the District Court denying their motion to dismiss the complaint or to strike portions thereof?

Defendants improperly present a number of additional questions going to the *merits* of their motion to dismiss or strike. If the Court of Appeals was without appellate jurisdiction, these questions are obviously not open for review. If, on the other hand, appellate jurisdiction were held to exist, the merits should, in the first place, be passed on by the Court of Appeals. In neither event should they be now considered by this Court.

Out of precaution, however, we shall briefly show that the District Court's decision was correct and that defendants' motion to dismiss or strike does not merit Supreme Court review.

Statement of the Case

The pleadings.

Plaintiff, a stockholder of defendant Affiliated Fund, Inc. (the "Fund"), a registered mutual fund, brings this action on behalf of the Fund against its directors and against its investment adviser and principal underwriter, defendant

Lord, Abbett & Co. (the "Management Company"). The complaint charges violations of the Investment Company Act, the Securities Exchange Act and the Investment Advisers Act. The District Court's jurisdiction is invoked under these statutes (R 13a-14a).*

The complaint (R 13a) alleges, among other things, that the Fund bought and sold securities for its portfolio and, in that connection, paid substantial commissions to securities brokers. The Management Company diverted part of the commissions to its own advantage through practices known as "give-ups", "reciprocal brokerage" and "interpositioning". As a result, it received additional compensation in excess of that provided by its agreements with the Fund. But for the diversions, the Fund could have recaptured part of the commissions for its own benefit. Practices like these have been severely criticized by the SEC** and have been held to constitute violations of the Investment Company Act, *Papilsky* v. *Berndt*, 466 F. 2d 251, 254 n. 3 (2d Cir.), *cert. denied*, 409 U.S. 1077 (1972); *Moses* v. *Burgin*, 445 F. 2d 369 (1st Cir.), *cert. denied* sub nom. *Johnson* v. *Moses*, 404 U.S. 994 (1971).

In compliance with FRCP 23.1, the complaint alleges that demand on the directors of the Fund to bring this action would have been futile for at least two separate reasons: All the directors had participated in the wrongs alleged; and all were identified with the Management Company or controlled by it (R 19a). More particularly:

---

* As used herein, "R" refers to the Joint Appendix below, "A" to the Appendix of the Petition.

** Securities and Exchange Commission, Report on the Public Policy Implications of Investment Company Growth, 89th Cong., 2d Sess., H.R. 2337 (1966), pp. 108-10, 172-173.

1. The Fund, it is alleged, had seven directors at the commencement of the action (¶ 6(a), R 14a). All of them were directors at the time of the wrongs alleged (*ibid.*). All of them are named as defendants.* All of them participated or acquiesced in the wrongs alleged and are liable therefor (¶ 19(a), R 19a). Their conduct was willful and in bad faith or grossly negligent (¶ 17, R 18a). In these circumstances, the directors could not be expected to bring this action because they would have had to sue themselves; had they brought the suit, they could not have been entrusted with its effective prosecution (¶ 19(c), R 19a).

2. Moreover, three of the seven Fund directors were partners of the Management Company ("affiliated directors"); they were also the principal executives of the Fund (¶ 6(b), R 15a). The other Fund directors ("outside directors") were under the control of the Management Company and the affiliated directors (¶¶ 7 and 19(b), R 15a, 19a).** The means for the exercise of control were readily at hand: The only meaningful activities of the Fund—the sale of its shares to the public and the investment of the resulting funds in securities—were in the hands of the Management Company; and the principal executives of the Fund were partners of the Management Company. The control of the

---

* Some of them were dismissed because of delay in the service of process on them (A-50).

** If the outside directors are found to have been controlled by the Management Company, they were "affiliated" with it; § 2(a)(3)(C) of the Investment Company Act. Contrary to defendants' suggestion, the rebuttable presumption of non-control, § 2(a)(9) of the Act, does not prevent a court from finding control; *Matter of Fundamental Investors, Inc.*, '61-'64 CCH Fed. Sec. L. Rep. ¶ 76,887, at pp. 81,273-74 (SEC 1962). The presumption is irrelevant on a motion to dismiss, *In re Kauffman Mutual Fund Actions*, 479 F. 2d 257, 263 n. 4 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973).

outside directors by the Management Company and its partners is alleged as a second reason rendering demand on the directors futile (¶ 19(b) and (c), R 19a).

The answer of the Fund (R 177a) denies most of the allegations of the complaint and asserts various affirmative defenses, including the statute of limitations and res judicata. Such being the Fund's position, it is plain that it would not have brought this action even if the directors had been asked to do so.

The Fund does, however, admit that it engaged in the policies and practices complained of and that the directors, allegedly in the exercise of business judgment, sanctioned those practices (Fund answer ¶ 14, R 179a-180a). The answer of the other defendants makes similar admissions (R 169a-172a).

Defendants' motions in the District Court.

Following the commencement of this action in June 1971, defendants moved for summary judgment on the ground that the dismissal of an earlier similar stockholder's action constituted res judicata. The District Court denied the motion (A-64); the Second Circuit, having permitted an interlocutory appeal, affirmed (A-72); and this Court denied certiorari (A-90). *Papilsky* v. *Berndt*, 333 F. Supp. 1084 (S.D.N.Y. 1971), *aff'd*, 466 F. 2d 251 (2d Cir.), *cert. denied*, 409 U.S. 1077 (1972).

Thereafter, in February 1973—twenty months after the commencement of the action—defendants made the pleading motion which they now seek to bring before this Court (R 40a). They offer no excuse for their delay, nor do they

explain their failure to combine the pleading motion with their previous motion for summary judgment.

Defendants' new motion had two branches (R 41a). The first sought an order striking certain allegations of the complaint pursuant to FRCP 11 and 23.1 on the theory that neither the plaintiff nor her lawyer had reasonable grounds for making these allegations.* However, the allegations concerning control of the outside directors and concerning the futility of a demand on the directors (¶¶ 7 and 19, R 15a, 19a) were *not* among those sought to be stricken. Accordingly, this branch of defendants' motion is irrelevant to the present petition, which deals only with the necessity of demand on the directors.

The second branch of defendants' motion (R 41a) sought dismissal of the complaint pursuant to FRCP 23.1 and 41(b) "because plaintiffs failed to allege 'with particularity' the efforts" they made to secure action by the directors of the Fund.** This part of the motion was strictly addressed to the face of the complaint, whose allegations, it was said, were not made "with particularity".

Defendants' motion, it should be noted, did not purport to seek summary judgment, FRCP 56. The moving affidavit of defendants' lawyer, Mr. Parsons (R 43a), argued

---

* Defendants sought to support this contention by an affidavit of their lawyer, Judson A. Parsons, Jr. (R 43a); but the deposition of plaintiff's lawyer, Abraham L. Pomerantz (R 62a), demonstrates the extensive and meticulous investigation that preceded the filing of the complaint. The "admission" attributed to Mr. Pomerantz that there was no basis for the allegations (Pet. 8, 9, 19) is a figment of defendants' wishful thinking.

** Of course, the complaint does not allege any efforts of plaintiff to secure action by the directors of the Fund. It does allege that a demand on the directors would have been futile and states the reasons with particularity (pp. 3-5, above).

that plaintiff brought this suit without adequate advance information; but it did not contradict any allegation of the complaint, nor did it attempt to demonstrate the absence of a genuine issue of fact. It did not even try to rebut the allegation that all the directors of the Fund had participated in the wrongful transactions.

The decisions below.

1. The District Court, as noted, denied defendants' motion (A-31; 59 F.R.D. 95). Its careful opinion first considered the second branch of the motion, which sought dismissal of the complaint in its entirety on the ground that plaintiff's efforts with the directors of the Fund were not "allege[d] 'with particularity' ". The Court found that these allegations were sufficient and amply particularized. Since, as shown, this part of the motion was addressed solely to the face of the pleading, the Court rightly held that, *in this connection*, the moving affidavit of Mr. Parsons was not relevant.

The Court then turned to that part of the motion seeking to strike portions of the complaint. In that connection, the Court did consider the Parsons affidavit and the Pomerantz deposition* and concluded that plaintiff's charges are neither "sham and false" nor "devoid of factual basis" (A-38).

---

* The decision states (A-37):

> "Defendants have also moved to strike certain allegations from the complaints, pursuant to Rule 11, F.R.Civ.P. * * * As a basis for their motion, they have submitted the deposition of plaintiff's counsel, as well as certain other additional material."

In the course of argument, the Court stated, "I have read all these papers" (A-17).

Defendants' repeated assertion (Pet. 3, 9, 19) that the District Court refused to consider the Parsons affidavit and Pomerantz deposition is thus contrary to fact.

2. Although defendants' application for an interlocutory appeal certificate was denied (A-43), they did take an appeal. The Court of Appeals, without reaching the merits (A-46), dismissed the appeal for lack of appellate jurisdiction (A-41). The order appealed from, it held, was interlocutory, and the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), was inapplicable. Applications for rehearing and rehearing en banc having been denied (A-47, A-48), defendants' present petition for certiorari followed.

REASONS FOR DENYING THE WRIT

I

The Court of Appeals properly held that it lacked jurisdiction of defendants' appeal.

Since the first Judiciary Act of 1789, the rule against piecemeal appeals has been the firm policy of the federal courts; *Cobbledick* v. *United States*, 409 U.S. 323 (1940). The rule, now embodied in 28 USC § 1291, requires a "final decision" for appeal purposes.* It is settled law that the denial of a motion to dismiss is not a final decision and is, therefore, not appealable. *Catlin* v. *United States*, 324 U.S. 229, 236 (1945); *Fleming* v. *Berardi*, 441 F. 2d 732 (3rd Cir. 1971); 2A *Moore's Fed. Prac.* ¶ 12.14, p. 2338 (2d Ed. 1974).

---

* The statutory exceptions to the requirement of finality, 28 USC § 1292, are not applicable.

The present case glaringly reflects the evils of piecemeal appeals. Once before these defendants sought to have the action dismissed (on res judicata grounds) and carried their unsuccessful motion up to this Court. The attempt having failed and almost two years having passed, defendants made a second motion to dismiss, this time for supposed pleading defects.* Again they failed; again they are dragging their unsuccessful motion through the entire appellate hierarchy. Three and one-half years after the commencement of the action, the parties are thus still arguing whether the complaint is pleaded with sufficient "particularity". This Court is now asked to prolong an appellate battle about the pleadings which, under the rule of finality, should never have gone beyond the District Court.

2. Defendants invoke the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), to sustain their appeal. The argument is boiler plate; there—

> "appears to be an irresistible impulse on the part of appellants to invoke the 'collateral order' doctrine whenever the question of appealability arises."
>
> *Borden Co.* v. *Sylk*, 410 F. 2d 843, 845-46 (3rd Cir. 1969).

In the present case, the Court below gave thorough consideration to the *Cohen* doctrine (A-44 *et seq.*). *Cohen* has been on the books for a quarter of a century. It has been expounded, applied, distinguished and explained by this

* Defendants could and should have combined this motion with their original motion for summary judgment. Their piecemeal motions are as dilatory as their piecemeal appeals.

Court and by countless decisions of the courts of appeals.* Against this background, the further application of the *Cohen* doctrine may well be left to the courts of appeals, lest this Court be swamped with the endless minutiae of appellate jurisdiction and procedure. Nothing in the decision below presents a problem so extraordinary, unusual or far-reaching as to warrant review by this Court.

3. In any event, the decision below is clearly correct. As the Court noted, "we are not aware of, and counsel have not cited to us, any case where federal appellate review of an order denying a motion addressed to the pleadings has been permitted" (A-44). Defendants have been unable to meet this challenge; the petition does not cite a single authority contradicting the Court below.

Cohen establishes several criteria of appealability (337 U.S. at 545-47). They are cumulative; *all* must be met before an appeal from an otherwise interlocutory order will lie. None of them is here satisfied.

(a) In the first place, the decision, to be appealable, must determine a claim of right that is "separable from, or collateral to, rights asserted in the action" (337 U.S. at 546), i.e., "a claimed right which is not an ingredient of the cause of action and does not require consideration with it" (pp. 546-47). That was true in *Cohen*, where the plaintiff's duty to give security for the litigation expenses of the defendants certainly was not an ingredient of her cause of action. But the opposite is true in the present case: The "claimed right" here is plaintiff's right to sue on behalf

* The citations to the *Cohen* case occupy eight columns in Shepard's United States Citations.

of the Fund, and that is plainly an "ingredient" and precondition of plaintiff's cause of action; *Ross* v. *Bernhard*, 396 U.S. 531, 534-35 (1970):

> "As elaborated in the cases, one precondition for the [stockholder's derivative] suit was a valid claim on which the corporation could have sued; another was that the corporation itself had refused to proceed after suitable demand, unless excused by extraordinary conditions. Thus the dual nature of the stockholder's action: first, the plaintiff's right to sue on behalf of the corporation, and, second, the merits of the corporation's claim itself." (Footnotes omitted)

Defendants try to escape the obvious by suggesting that the "claimed right" is the right of the Fund not to be involved in litigation which the outside directors regard as unwise (Pet. 11, 12).* In other words, the claimed right, say defendants, is not plaintiff's standing to sue but the "right" of the Fund and its directors to dispute plaintiff's standing. We submit this is just a play on words. Whichever side of the coin be regarded, the ultimate answer will determine whether plaintiff has standing and, hence, whether she has a valid claim. The District Court's order thus did not deal with a "collateral" right.

(b) Even where a claimed right is collateral, only a "final disposition" thereof is appealable (337 U.S. at 546). "So long as the matter remains open, unfinished or incon-

---

* The record contains not a shred of evidence that the outside directors do regard the litigation as unwise. Even if they did, they would be disqualified from exercising a business judgment concerning the wisdom of the action. Their participation in the wrongful acts and their liability for the consequences, alleged in the complaint, must be accepted as true for purposes of the motion to dismiss.

clusive, there may be no intrusion by appeal" (*ibid.*). Here the District Court decided merely that the complaint sufficiently *pleads* plaintiff's standing. This is not a final disposition of plaintiff's claim to standing, for the allegations must still pass the test of trial. It is elementary that, in a stockholder's action, the allegations concerning demand on the directors must be proved at the trial, *Cathedral Estates* v. *Taft Realty Corp.*, 228 F. 2d 85, 88 (2d Cir. 1955); *deHaas* v. *Empire Petroleum Co.*, 286 F. Supp. 809, 813-15 (D. Colo. 1968), *aff'd* on this point, 435 F. 2d 1223, 1228 (10th Cir. 1970). Short of trial, the District Court's decision here, limited as it was to a pleading question, did not "finally determine" plaintiff's right to maintain this action.

(c) Even where a district court "finally" determines a "collateral" right, its decision is appealable only if it is "too important to be denied review" (337 U.S. at 546). The Court of Appeals here refused to ascribe such importance to the decision of the District Court; for if there was error, it can be corrected upon review of the final judgment.*

According to defendants (Pet. 13), the issue of plaintiff's standing cannot be raised on appeal from a final judgment. We fail to see why not. If plaintiff should lose and take an appeal, defendants can seek affirmance on the ground of her

* By contrast, the District Court's erroneous decision in *Cohen* could not be rectified after final judgment; for after the case was over, the plaintiff could not have been forced to give the statutory security for the defendants' litigation expenses. By the same token, this Court held in *Eisen* v. *Carlisle & Jacquelin*, U.S. , 40 L. Ed. 2d 732, 744-45 (1974), that the District Court's decision (requiring the defendants to pay 90% of the cost of a class notice) "could not be reviewed effectively on appeal from the final judgment."

lack of standing. If plaintiff should win, defendants may appeal and urge, if they are so advised, that the directors in their business judgment do not want to enforce the corporate claim.

Defendants urge that an appeal after final judgment would come too late because the Fund would already have incurred the expense and inconvenience of litigation. This is not, however, the kind of detriment justifying an immediate appeal. Whenever a district court denies a motion to dismiss—for lack of jurisdiction, legal insufficiency, statute of limitations and the like—the moving party suffers a similar loss by having to litigate to final judgment before appealing. Congress weighed precisely these considerations; it overruled them because "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise" are a greater evil; *Cobbledick, supra*, 309 U.S. 323, 325; *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943). This is a far cry from *Cohen*, where the denial of an immediate appeal would have deprived the defendants of a *statutory right* to security (337 U.S. at 546).

(d) Even where a district court "finally" determines a "collateral" right of sufficient "importance", its decision is appealable under the *Cohen* rule only if "a serious and unsettled question" has been presented (337 U.S. at 547). We perceive no such question here. The requirement of a demand on the directors, or a valid excuse therefor, has been recognized since *Hawes* v. *Oakland*, 104 U.S. 450 (1882); see FRCP 23.1 and its predecessor rules.* It is difficult to

* The successive Rules are listed in *Ross* v. *Bernhard, supra*, 396 U.S. at 534 n. 4.

believe that, after nearly a century, this well-plowed area of the law should still harbor a serious and unsettled question. In any case, no such question was presented to or decided by the District Court, for that Court simply ruled that the demand allegations of the complaint are sufficiently particularized and that, despite Mr. Parsons' affidavit, the complaint is not "devoid of factual basis".

In short, none of the conditions for an appeal under the *Cohen* rule is satisfied. The Court of Appeals was, therefore, clearly right in refusing to apply the doctrine and in dismissing defendants' appeal for lack of appellate jurisdiction.

II

The District Court properly denied defendants' motion; its decision involves no question warranting review by this Court.

As noted, the merits of defendants' motion to dismiss the complaint or to strike portions thereof are not properly before this Court. Only out of precaution we discuss them briefly.

1. As one ground excusing a demand on the directors, the complaint alleges that all of them participated or acquiesced in the wrongs complained of, that their conduct was willful, in bad faith or grossly negligent,* and that they are liable therefor (¶¶ 17, 19, R 18a-19a). It would seem evident that directors so situated cannot exercise an unbiased business judgment concerning the desirability of

* FRCP 9(b) provides that "Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

bringing suit against themselves. Demand on them is, therefore, excused. The District Court so held and the authorities are in agreement.

Thus in *Liboff* v. *Wolfson*, 437 F. 2d 121 (5th Cir. 1971), the complaint merely alleged that a majority of the directors "participated, approved of and acquiesced in said transactions and are liable therefor." The Court of Appeals held that these allegations met the requirements of Rule 23.1. Accord: *Meltzer* v. *Atlantic Research Corp.*, 330 F. 2d 946, 947 (4th Cir.), *cert. denied*, 379 U.S. 841 (1964); *Cathedral Estates* v. *Taft Realty Corp.*, 228 F. 2d 85, 88 (2d Cir. 1955); *Dopp* v. *American Electronic Laboratories*, 55 F.R.D. 151, 153-54 (S.D.N.Y. 1972).

Defendants contend, nevertheless, that even the misconduct of the directors does not excuse a demand on them unless their wrongdoing was "self-interested" (Pet. 17). None of defendants' cases so holds. See, e.g., *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U.S. 261, 264 (1917) (demand held excused "where the directors are guilty of misconduct equivalent to a breach of trust"; no mention of self-interest); *Swanson* v. *Traer*, 249 F. 2d 854 (7th Cir. 1958) ("no showing * * * that a majority of the directors * * * had been guilty of any misconduct whatsoever" [p. 856]; again no reference to self-interest); *Ash* v. *International Business Machines*, 353 F. 2d 491, 493 (3rd Cir. 1965) (stockholder must allege that the directors are "personally involved *or* interested in the alleged wrongdoing" [emphasis added]); *In re Kauffman Mutual Fund Actions*, 479 F. 2d 257 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973) (demand on directors held not to be excused because majority were not charged with any misconduct [p.

264]; balance of decision [pp. 265-67] was dictum); *Cathedral Estates, supra*, 228 F. 2d 85, 88 ("where the directors * * * are * * * involved in the transaction attacked, a demand on them is presumptively futile and need not be made").

Indeed, this Court has gone even further. In *Smith* v. *Sperling*, 354 U.S. 91, 94 and n. 2 (1957), the District Court had found that the directors had not participated in the acts complained of and were not disqualified from faithfully doing their duty, but that a demand on them would have been futile. This Court held that "The bill therefore meets the requirements of Rule 23(b)" [now Rule 23.1] that the stockholders show with particularity the reasons for not making a demand on the directors.

The allegations of the present complaint are thus ample to particularize the reasons for plaintiff's failure to demand action by the directors of the Fund.

2. Defendants (Pet. 15) criticize the decision below for stating that, even if plaintiff were now required to make a demand on the directors, she could, after rejection of her demand, reinstitute the action (see A-45). This ruling, say defendants, overlooks the binding force of the directors' business judgment that no action should be brought. Actually, however, it is defendants who overlook that the directors' participation in the wrongful transactions prevents them from exercising any unbiased and valid business judgment.

3. Defendants contend (Pet. 18-21) that the action should have been dismissed under FRCP 11 and 23.1 because plaintiff and her lawyer, Abraham L. Pomerantz,

had no reasonable basis for the charges made in the complaint. The lack of a reasonable basis is said to appear from Mr. Parsons' affidavit (R 43a) and Mr. Pomerantz's deposition (R 64a).

The answer can be short. As previously noted (pp. 7-8, above), the District Court did consider the affidavit and deposition and found that plaintiff's charges are neither "sham and false" nor "devoid of factual basis" (A-37 to A-38). The evaluation of the testimony is, of course, the province of the trial court. Defendants' factual disagreement with Judge Tyler is hardly ground for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: November 12, 1974.

Respectfully submitted,

WILLIAM E. HAUDEK
295 Madison Avenue
New York, N.Y. 10017
Tel. (212) 532-4800
Attorney for Plaintiff-Respondent Paulette Papilsky.

ABRAHAM L. POMERANTZ,
DANIEL W. KRASNER,
POMERANTZ LEVY
HAUDEK & BLOCK,
Of Counsel